Lee Phet Boon v Hock Thai Finance Corp Bhd

HIGH COURT (MIRI) — ORIGINATING MOTION NO MR9 OF 1993
ABDUL KADIR SULAIMAN J
23 APRIL 1994

Civil Procedure *— Mode of commencement — Setting aside order for sale — Whether properly made by originating motion — Rules of the High Court 1980 O 5 rr 1 & 5*

Civil Procedure *— Judgments and orders — Order for sale made by court — Subsequent proceedings to set aside — Whether judge functus officio — Whether court of co-ordinate jurisdiction could set aside earlier order — Whether only court of superior jurisdiction could set aside order — Rules of the High Court 1980 O 28 r 4(1) & O 32 r 6*

Civil Procedure *— Certiorari — Declaration — Application for certiorari or declaration that order for sale was ultra vires — Whether order amenable to certiorari or declaration — Proper procedure to be adopted — Rules of the High Court 1980 O 15 r 16 & O 56 — Courts of Judicature Act 1964 s 68*

Civil Procedure *— Declaration — Application for declaration that order for sale was ultra vires — Whether judge could be made a party to application — Immunity of judges — Courts of Judicature Act 1964 s 14(1) — Rules of the High Court 1980 O 15 r 16*

Land Law *— Order for sale — Public auction — Order for sale at reduced reserve price — Application to set aside order — Procedure applicable*

The defendant had obtained an order for the sale of the plaintiff's land ('the land') under a charge created its favour by the plaintiff. The court ordered that the land be sold by public auction pursuant to s 148(2)(c) of the Sarawak Land Code (Cap 81) ('the Code') at the reserve price of RM150,000. There were no bidders. By a summons-in-chambers dated 19 August 1991, the defendant applied for the land to be auctioned at a reduced reserve price of RM135,000. The judge allowed the application and made the relevant order ('the first order'), subject to the directions of the court and s 151 of the Code. On a summons for directions, the senior assistant registrar ('the SAR') made a second order, inter alia, that the auction sale be held on 12 June 1993 with the reserve price of RM135,000. The plaintiff was absent at the making of both orders although the notice of proceedings were duly served on him.

The plaintiff then applied by way of a notice of originating motion pursuant to O 8 r 3 of the Rules of the High Court 1980 ('the RHC') to set aside both orders, or alternatively, for a declaration that the orders were ultra vires and null and void on the grounds that the orders were: (1) beyond the powers and jurisdiction of the judge and the SAR; and (2) not in accordance with the law and contrary to and in conflict with the terms and conditions specified in ss 150(1) and 152 of the Code.

In response, the defendant's counsel raised the preliminary objections that: (i) the plaintiff's application should have been made

by way of originating summons and not originating motion; and (ii) the court, being of a co-ordinate jurisdiction as the court making the orders, had no authority to deal with the application, as the judge who made the first order was functus officio.

Held, dismissing the plaintiff's application:
According to O 5 r 5 of the RHC, it is clear that an originating motion is only to be used when required or authorized by the RHC or by or under any written law, in this case, the Code. There is no specific rule or section in the RHC or the Code which requires or authorizes the plaintiff to begin this nature of proceedings by originating motion. Accordingly, the plaintiff had adopted the wrong procedure to bring his grievances before the court and the preliminary objection raised by the defendant was allowed. On that ground alone, the plaintiff's application would be dismissed.

Per curiam:
(1) The judge was not functus officio because his order was not a final order as it was made ex parte. Under O 28 r 4(1), the ex parte order may be varied or revoked by a subsequent order of the court on such terms as it thinks fit and, under O 32 r 6, such an order may be set aside by the court. An application to set aside an ex parte order is not an appeal which requires a court of superior jurisdiction to deal with it.
(2) As regards the alternative prayer for a declaration that the orders were ultra vires, the orders made pursuant to s 148 of the Code could not be treated as administrative or quasi-judicial orders. In the circumstances, an order made by a judge pursuant to that section was not subject to certiorari and a declaration would not lie in regard to the two orders. The remedy for the plaintiff would lie in an appeal as spelt out under O 56 of the RHC and s 68 of the Courts of Judicature Act 1964.
(3) Furthermore, a declaration could not be granted as the judge and the SAR were not made parties to the action. There was no merit in the plaintiff's counsel's submission that they could intervene in the proceedings if they so wished. Under s 14(1) of the Courts of Judicature Act 1964, judges and persons acting in a judicial capacity are not liable to be sued for acts done in the discharge of their judicial duties. Therefore, if a prospective defendant is immune from liability in tort, it is not open to a plaintiff to avoid that immunity by framing the proceedings as a claim for a declaration of the plaintiff's rights under O 15 r 16 of the RHC instead of a direct claim in tort.

[Bahasa Malaysia summary

Defendan telah mendapat suatu perintah untuk menjual tanah plaintif ('tanah itu') di bawah suatu gadaian yang diberikan kepadanya oleh plaintif. Mahkamah telah memerintahkan supaya tanah itu dijual

melalui lelong awam di bawah s 148(2)(c) Kanun Tanah Sarawak (Bab 81) ('Kanun itu') pada harga rizab sebanyak RM150,000. Tidak ada orang yang membuat tawaran. Melalui suatu saman dalam kamar bertarikh 19 Ogos 1991, defendan telah memohon supaya tanah itu dilelong pada harga rizab yang diturunkan kepada RM135,000. Hakim telah membenarkan permohonan itu dan membuat perintah yang berkenaan ('perintah pertama'), tertakluk kepada arahan mahkamah dan s 151 Kanun itu. Atas suatu saman untuk arahan, penolong kanan pendaftar ('PKP itu') telah membuat perintah kedua bahawa, antara lain, jualan lelong itu diadakan pada 12 Jun 1993 dengan harga rizab RM135,000. Plaintif tidak hadir apabila kedua-dua perintah itu telah dibuat walaupun notis prosiding telahpun disampaikan kepadanya.

Plaintif kemudiannya telah memohon melalui suatu notis usul pemula di bawah A 8 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk mengetepikan kedua-dua perintah itu, atau secara alternatif, untuk suatu deklarasi bahawa perintah itu ultra vires dan batal dan tidak sah atas alasan bahawa perintah itu: (1) di luar kuasa dan bidang kuasa hakim dan PKP itu; dan (2) tidak sejajar dengan undang-undang dan bertentangan serta bercanggah dengan terma dan conditions yang ditetapkan di dalam ss 150(1) dan 152 Kanun itu.

Sebagai jawapannya, peguambela defendan telah menimbulkan bantahan permulaan bahawa: (i) permohonan plaintif seharusnya dibuat melalui saman pemula dan bukannya usul pemula; and (ii) mahkamah, yang mempunyai bidang kuasa yang salaras dengan mahkamah yang membuat perintah itu, tidak mempunyai kuasa untuk membicarakan permohonan itu, kerana hakim yang membuat perintah pertama sudahpun menjadi functus officio.

Diputuskan, menolak permohonan plaintif:
Mengikut A 5 k 5 KMT, adalah jelas bahawa suatu usul pemula hanya boleh digunakan apabila diperlukan atau dibenarkan oleh KMT atau oleh atau di bawah sebarang undang-undang bertulis, iaitu di dalam kes ini, Kanun itu. Tidak ada mana-mana kaedah atau seksyen yang spesifik di dalam KMT atau Kanun itu yang memerlukan atau memberikan kuasa kepada plaintif untuk memulakan prosiding yang bersifat sebegini melalui usul pemula. Dengan demikian, plaintif telah menggunakan prosedur yang salah untuk membawa kilanannya ke hadapan mahkamah dan bantahan permulaan yang ditimbulkan oleh defendan dibenarkan. Berdasarkan alasan itu sahaja, permohonan plaintif akan ditolak.

Per curiam:
(1) Hakim itu tidak menjadi functus officio kerana perintahnya bukan suatu perintah muktamad oleh sebab ia dibuat secara ex parte. Di bawah A 28 k 4(1), perintah ex parte itu mungkin diubah atau dibatalkan oleh suatu perintah mahkamah kemudiannya atas terma

sebagaimana yang difikirkan adil dan, di bawah A 32 k 6, suatu perintah seperti itu boleh diketepikan oleh mahkamah. Suatu permohonan untuk mengetepikan suatu perintah ex parte bukannya suatu rayuan yang memerlukan mahkamah yang berbidang kuasa atasan untuk membicarakannya.

(2) Berkenaan dengan permohonan alternatif untuk suatu deklarasi bahawa perintah itu adalah ultra vires, perintah yang dibuat di bawah s 148 Kanun itu tidak boleh disifatkan sebagai perintah pentadbiran atau kuasi-kehakiman. Di dalam keadaan demikian, suatu perintah yang dibuat oleh seorang hakim di bawah seksyen tersebut tidak tertakluk kepada certiorari dan suatu deklarasi tidak boleh dipohon berkenaan dengan kedua-dua perintah itu. Remedi untuk plaintif adalah untuk membawa suatu rayuan sepertimana yang ditetapkan di bawah A 56 KMT dan s 68 Akta Mahkamah Kehakiman 1964.

(3) Lebih-lebih lagi, suatu deklarasi tidak boleh dibenarkan kerana hakim dan PKP tidak dijadikan pihak kepada tindakan ini. Tidak ada merit di dalam hujah peguambela plaintif bahawa mereka boleh mencelah di dalam prosiding ini jika mereka ingin berbuat demikian. Di bawah s 14(1) Akta Mahkamah Kehakiman 1964, hakim dan orang yang bertindak di dalam keupayaan kehakiman tidak boleh didakwa atas perbuatan yang dilakukan apabila melaksanakan tugas kehakiman mereka. Oleh itu, jika seorang bakal defendan dikebal daripada liabiliti dalam tort, plaintif tidak boleh mengelak daripada kekebalan itu dengan membentuk prosiding itu sebagai suatu tuntutan untuk suatu deklarasi mengenai hak plaintif di bawah A 15 k 16 dan bukan sebagai suatu tuntutan langsung di bawah tort.]

Notes

For a case on setting aside a court order by subsequent proceedings, see [1992] Mallal's Digest 282.

Cases referred to

1 *United Malayan Banking Corp Bhd v Sykt Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546 (folld)
2 *United Overseas Bank Ltd v Chung Khiaw Bank Ltd* [1968] 2 MLJ 85 (folld)
3 *Trawnik v Ministry of Defence* [1984] 2 All ER 791 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 14(1)
Rules of the High Court 1980 O 5 rr 1 and 5, O 15 r 16, O 28 r 4

Tai Choi Yu (*Tai Choi Yu & Co*) for the plaintiff.
Vincent YH Lu (*Khoo & Co*) for the defendant.

Cur Adv Vult

Abdul Kadir Sulaiman J: This is an application by the plaintiff by way of a notice of originating motion dated 24 November 1993 made pursuant to O 8 r 3 of the Rules of the High Court 1980 (hereinafter referred to as 'the RHC') for an order that the two orders made in chambers by Denis Ong J dated 9 March 1992, and by the senior assistant registrar dated 4 March 1993 in Miri High Court Originating Summons No MR46 of 1987 (hereinafter referred to as 'the impugned orders') be jointly and severally discharged or set aside. In the alternative, the plaintiff prays for a declaration that the impugned orders are ultra vires and null and void. The grounds given for the application are that the impugned orders:

(1) were beyond the powers and jurisdiction of the learned judge and senior assistant registrar; and
(2) were not made in accordance with the law and are contrary to and in conflict with the terms and conditions specified in ss 150(1) and 152 of the Sarawak Land Code (Cap 81) (hereinafter referred to as 'the Code').

On 14 March 1988 the court ordered that the plaintiff's land ('the said land'), the subject matter of a charge, be sold by public auction pursuant to s 148(2)(c) of the Code at the reserve price of RM150,000. There were no bidders. By a summons-in-chambers dated 19 August 1991, the defendant applied for an order that the plaintiff's said land be again put up for auction at a reduced reserve price of RM135,000 based on a valuation report put up by a private valuer. On 9 March 1992, Denis Ong J allowed the application and made the first impugned order, subject to the directions of the court and s 151 of the Code. On a summons for directions, the learned senior assistant registrar, on 4 March 1993, made the second impugned order inter alia, that the auction sale be held on 12 June 1993 with the reserve price of RM135,000 and that the proceeds of sale be paid into court and be dealt with in the manner provided in s 151 of the Code. The two impugned orders were made in the absence of the plaintiff who was duly served with the notice of the proceedings. The auction sale was carried out and the proceeds of the sale were duly deposited in court. By a summons-in-chambers dated 14 July 1993, the defendant applied for payment out of the proceeds of sale and the execution of the memorandum of transfer of the said land under ss 150 and 151 of the Code. The said application was adjourned to a date to be fixed in the light of the present application of the plaintiff as mentioned above.

At the hearing of the present application of the plaintiff, the learned counsel for the defendant raised various preliminary objections to the application. First, on the process adopted by the plaintiff in filing this application. It is said that it should be by way of a summons instead of by a motion. He cited the cases of *United Malayan Banking Corp Bhd v Sykt Perumahan Lunas Sdn Bhd*[1] and *United Overseas Bank Ltd v Chung Khiaw Bank Ltd*[2] as authorities in support. In reply, the learned counsel for the plaintiff submitted that it was so done as the plaintiff is commencing a new suit or action made pursuant to O 8 r 3 of the RHC. Thus it is clear that the intention of the plaintiff in making this application is that he is instituting

a fresh suit or action against the defendant. He is, therefore, not making an application to set aside an order made ex parte pursuant to O 32 r 6 of the RHC. The two impugned orders were made in the absence of the plaintiff who was duly served with the process for the hearings. In *United Malayan Banking Corp Bhd v Sykt Perumahan Lunas Sdn Bhd*,[1] Edgar Joseph Jr J (as he then was) in overruling the preliminary objection raised, approved of the decision of the Singapore Court of Appeal in the case of *United Overseas Bank Ltd v Chung Khiaw Bank Ltd*[2] where Chua J, delivering the judgment of the court touching on the provision of O LIII r 4(1) of the Singapore Rules of the Supreme Court, then in force, which generally is in pari materia with O 28 r 4(1) of the RHC, said [at p 87]:

> It is clear then that a judge may proceed ex parte to hear an application where a party duly served fails to appear at the time appointed for the hearing. An application so heard in the absence of a party is not an ex parte application. It is the hearing which is ex parte and an order made on such a hearing is an ex parte order within the terms of O LIII r 4(1).

To resolve the matter as regards the procedure quarrelled about, one needs to look first at O 5 r 5 of the RHC which provides:

> Proceedings may be begun by originating motion or petition *if, but only if,* by these rules or by or under any written law the proceedings in question are required or authorised to be so begun. (Emphasis added.)

Thus, from the said order, it is clear that originating motion is only to be used when required or authorized by the RHC or by or under any written law, which in this case is the Code. Perusing the RHC and the Code, I cannot find any specific rule or section which requires or authorizes the plaintiff to begin this nature of the proceedings as contained in this application by originating motion. In fact, the Code does not at all prescribe the procedure for commencing an action of this nature. In the principal prayer, the plaintiff prays for the two impugned orders 'be jointly and/or severally discharged and/or set aside'. In the alternative, the plaintiff prays for a declaration that the two impugned orders are ultra vires and null and void.

Order 5 r 1 of the RHC states:

> Subject to the provisions of any written law and of these rules, civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition.

As mentioned earlier, originating motion not being the required or authorized mode, and the nature of the application is not one to be made by a petition, so what is left is the originating summons or a writ. Since the plaintiff has chosen the originating motion procedure to commence the action, I have no alternative but to agree with the submission of the learned counsel for the defendant and I accordingly allow the preliminary objection raised and hold that the plaintiff has adopted the wrong procedure to bring his grievances before the court. On this ground alone, I would dismiss the application of the plaintiff.

The second objection of the defendant is that this court being of a co-ordinate jurisdiction, has no authority to deal with the application relating to the impugned order made by Ong J as he is functus officio. Bearing in mind the intention of the plaintiff that by this application he is instituting a fresh action, assuming that the procedure he adopted is correct, which I have held as incorrect, I am inclined to disagree with the submission of the learned counsel for the defendant that the learned judge was functus officio when he made the impugned order

As mentioned earlier, his order is not a final order as it was made ex parte. Under O 28 r 4(1) the said order 'may be varied or revoked by a subsequent order of the Court on such terms as it thinks fit'. Under O 32 r 6, such an order may be set aside by the court. There are ample authorities on that which allow the court of a co-ordinate jurisdiction to deal with the matter. An application to set aside an ex parte order is not an appeal which requires a court of superior jurisdiction to deal with it. This is so in regard to the principal prayer of the plaintiff praying for the discharge or the setting aside of the order. However, as regards the alternative prayer for a declaration of the two impugned orders, O 15 r 16 states as follows:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations or right whether or not consequential relief is or could be claimed.

The learned author of *Mallal's Supreme Court Practice* (2nd Ed) at p 143 says:

> A declaration can be resorted to ascertain and determine the rights of parties or to determine a point of law or in place of an order of certiorari, especially where the time to apply for the prerogative order has expired: *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135.

And item 1 in the Schedule to the Courts of Judicature Act 1964 confers additional power to the High Court to issue certiorari. But the main issue is whether certiorari would lie to quash the decision of a judge of the High Court or other person acting judicially? The learned counsel for the plaintiff in his submission, says that when a judge exercises his power under s 148 of the Code in making the order for sale of land, he is acting in a quasi-judicial capacity or in the administrative capacity and therefore is amenable to a writ of certiorari. In the light of the provision of s 148 of the Code, that line of submission has no merit at all. The section states:

> (1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns, notice in writing that the chargee will resort to all available remedies unless such default be remedied.
> (2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court —
>
> (a) for an order entitling him to enter into possession and to be registered as proprietor of the charged land;

A (b) to receive the rents and profits of the charged land; or
(c) for the sale of the charged land,

and the Court after hearing the evidence may make such order as in the circumstances seems just.

So, the order made by a High Court under the section cannot by any stretch B of imagination be treated as an administrative or quasi-judicial order. In the circumstances, an order made by a judge pursuant to the said section is not subject to certiorari. What about a declaration then? In the first place, in these proceedings of the plaintiff for a declaration, the learned judge and the senior assistant registrar are not made parties to the action. The learned C counsel says if they so wish they can intervene in the proceedings. I see no merit at all in the submission. Be that as it may, according to the *White Book 1988* at p 225 on the scope of O 15 r 16, if a prospective defendant is immune from liability in tort, it is not open to a plaintiff who will suffer from his acts to avoid that immunity by the device of framing the proceedings as a claim for a declaration of the plaintiff's rights instead of a direct claim D in tort (see per Sir Robert Megarry VC in *Trawnik v Ministry of Defence*[3] at p 797). Section 14(1) of the Courts of Judicature Act 1964 states:

No Judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any E order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

So, with that it is clear that a declaration will not lie in regard to the two impugned orders made respectively by the learned judge and the senior assistant registrar. The remedy for the plaintiff in respect of any orders F made by the judge or the senior assistant registrar in the exercise of their judicial powers lies in an appeal as spelt out under O 56 of the RHC and s 68 of the Courts of Judicature Act 1964.

In the circumstances, I uphold the preliminary objections of the defendants and accordingly dismiss this application of the plaintiff with costs to the defendant.

G *Application dismissed.*

Reported by Anne Khoo

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